STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 30, 2000
v	No. 217376 Kent Circuit Court
ANTHONY DEVONE LAUDERDALE, a/k/a ANT, Defendant-Appellant.	LC No. 97-010063-FC

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and felony-firearm. He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to twenty-three to seventy-five years' imprisonment for the second-degree murder conviction to be served consecutively to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was deprived of his constitutional right to an impartial jury drawn from a fair cross section of the community because of the systematic exclusion of minority jurors in the county circuit court system. We disagree. We review de novo a question of systematic exclusion of minorities from a jury pool. *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996). A defendant establishes a prima facie violation of the fair-cross-section requirement by showing:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*Id*. at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664, 668; 58 L Ed 2d 579 (1979).]

Here, defendant challenges the exclusion of African-Americans from the jury array. African-Americans are a "distinctive group." *Hubbard, supra*. However, defendant has introduced no evidence supporting an underrepresentation of African-Americans on the jury array. Rather, the trial court indicated that the sixty-person jury array included seven African-Americans and two Hispanic-Americans. The trial court noted that the county's population was roughly ten percent African-American, while Grand Rapids' population was approximately fifteen percent African-American. Thus, defendant's actual jury array was within those two figures, a percentage we find insufficient to establish the second prong of the *Duren* test. In addition, a single case of alleged underrepresentation does not rise to the "general underrepresentation" required to satisfy the third prong of the *Duren* test. *People v Howard*, 226 Mich App 528, 533; 575 NW2d 16 (1997). Here, no data was presented in support of defendant's assertion of systematic exclusion. As stated above, the only evidence introduced involved the instant matter, which did not indicate underrepresentation. Therefore, defendant has not presented evidence sufficient to satisfy the second or third prongs of the *Duren* test. Consequently, defendant was not deprived of his constitutional right to a fair trial.

Defendant next argues that the trial court improperly coerced the jury to return a verdict after the jury reported its deliberations were deadlocked. We disagree. A trial court's instruction to a deadlocked jury is reviewed to determine whether it "substantially departed" from ABA standard jury instruction 5.4. *People v Hardin*, 421 Mich 296, 321; 365 NW2d 101 (1984).[1] In *Hardin*, the

[1] ABA standard jury instruction 5.4, as set forth in *Hardin, supra*, provides:

> Length of deliberations; deadlocked jury.
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> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
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> (i) that in order to return a verdict, each juror must agree thereto;
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> (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
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> (iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as

Supreme Court opined that this standard is measured by the coerciveness of the language used—rather than the specific words chosen by the trial court—in the factual context in which it was given. *Id.*; see *People v Goldsmith*, 411 Mich 555, 560-561; 309 NW2d 182 (1981). Defendant contends that the trial court's instructions improperly appealed to the jury's civic duty to return a verdict. However, the complained-of instructions were well-balanced statements encouraging the jurors to reconsider the opinions of other jurors and to reevaluate their own positions. The approved jury instruction allows the trial court to instruct the jurors that they "should not hesitate to reexamine" their views or change their opinions if so convinced. Although the trial court in the present case selected different words, we believe that an identical message was conveyed. See *Hardin, supra*. at 314, 321.

In sum, the instructions were not coercive and it did not substantially depart from the approved jury instruction's main theme—that the jurors' honest convictions outweigh the burden of a hung jury. The trial court repeatedly instructed the jurors that it would accept whatever they decided, whether a unanimous verdict or not. The trial court also reiterated, consistent with the approved jury instruction, that no juror should abandon an honest conviction regarding the evidence. We also note that the trial court allowed the jury considerable freedom to determine whether it should continue deliberating. Accordingly, we conclude that the complained-of instructions did not deprive defendant of his right to a fair trial.

Finally, defendant concedes that he did not object to the several statements during the prosecution's closing argument, which he alleges amounted to prosecutorial misconduct. The unpreserved instances of alleged misconduct could have been cured by cautionary instructions below and failure to review the issues would not result in manifest injustice. Thus, we decline any further review. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

Affirmed.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra
/s/ Jeffrey G. Collins

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provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.